Supreme Court, U.S.
FILED
FEB 28 1991
OFFICE OF THE CLERK

No. 90-1212

In The

Supreme Court of the United States

October Term, 1990

TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL.,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT STATE OF CALIFORNIA IN OPPOSITION

DANIEL E. LUNGREN
Attorney General of the
State of California

RICHARD M. FRANK*
Acting Assistant Attorney General

CARLA J. CARUSO
Deputy Attorney General

Office of the Attorney General
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone (916) 445-8178

Counsel for Respondent
State of California
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether petitioners' constitutional challenge to the 1984 Tahoe Regional Plan has been rendered moot because: a) a federal court, immediately following that Plan's enactment, enjoined it from ever taking effect; and b) respondent Tahoe Regional Planning Agency subsequently replaced the 1984 Plan with a new Regional Plan which differs materially from the 1984 Plan and has not been challenged in this litigation.

2. Whether the Court of Appeals properly applied the ripeness standards developed by this Court in several recent decisions to bar petitioners' facial takings challenge to the 1984 Tahoe Regional Plan, where petitioners by their own admission had failed to seek an amendment to that Plan as specifically authorized in the bistate Tahoe Regional Planning Compact.

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT 5

A. Petitioners' Constitutional Claims are Moot Because the 1984 Regional Plan Was Enjoined by Federal Court Order from Taking Effect, and Because it Has Been Wholly Superseded by a Materially Different 1987 Regional Plan 5

B. The Court of Appeals Properly Applied the Ripeness Standards Developed by This Court in Recent Decisions to Bar Petitioners' Facial Takings Challenge to the 1984 Regional Plan, Where Petitioners Had Failed to Seek an Amendment to That Plan as Specifically Authorized in the Tahoe Regional Planning Compact 7

1. The Unique Provision of the Tahoe Regional Planning Compact Applicable to This Proceeding Cannot Reasonably Be Ignored by Petitioners 7

2. The Ninth Circuit's Decision in Rejecting Petitioners' Facial Takings Challenge to the 1984 Regional Plan Is Fully Consonant with This Court's Previously-Articulated Ripeness Standards 8

3. The Decision Below Articulates a Ripeness Standard Fully Consistent with Those of Other Circuits 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

Agins v. Tiburon, 447 U.S. 255 (1980) 11

Beacon Hill Farm Associates v. Loudon County Board of Supervisors, 875 F.2d 1081 (4th Cir. 1989) 15

Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990), cert. denied, 59 U.S.L.W. 3441 (1991) 11, 15

Euclid v. Ambler, 272 U.S. 365 (1926) 11, 12

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1986) 12, 13

Fry v. City of Hayward, 701 F.Supp. 179 (N.D. Cal. 1988) 15

Goldblatt v. Hempstead, 369 U.S. 590 (1961) 13

Hodel v. Irving, 481 U.S. 704 (1987) 12

Keystone Bituminous Coal v. DeBenedictis, 480 U.S. 470 (1987) 12

Kinzli v. City of Santa Cruz, 818 F.2d 1449 (9th Cir. 1987), modified at 830 F.2d 968 (1987), cert. denied, 484 U.S. 1043 (1988) 8

Lewis v. Continental Bank Corp., 494 U.S. ___, 110 S.Ct. 1249 (1990) 6

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 13

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 10, 13, 16

TABLE OF AUTHORITIES – Continued

Page

Pennell v. City of San Jose, 485 U.S. 1 (1988)..... 10

People ex rel. Van de Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1308 (9th Cir. 1985) ...4, 5

Smithfield Concerned Citizens v. Town of Smithfield, 907 F.2d 239 (1st Cir. 1990).....11, 15

Southern Pacific Transportation Co. v. City of Los Angeles, 922 F.2d 498 (9th Cir. 1990)..... 14

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, CA No. 87-2096 3

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 611 F.Supp. 110 (D.Nev. 1985)..... 2

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 638 F.Supp. 126 (D.Nev. 1986)..... 2

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 911 F.2d 1331 (9th Cir. 1990) 3, 6

Webster v. Fall, 266 U.S. 507 (1925) 13

Williamson County v. Hamilton Bank, 473 U.S. 172 (1985) ..... *passim*

STATUTES

Indian Land Consolidation Act of 1983, Pub.L. 97-457, Tit. II, 96 Stat. 2519, § 207 12

TABLE OF AUTHORITIES – Continued

Page

INTERSTATE COMPACTS

Tahoe Regional Planning Compact, Pub.L. 96-551, 94 Stat. 3233 (1980); Cal. Gov. Code §§ 66800-66801; N.R.S. §§ 277.190-277.200 4

Art. V(a)(2) 5, 7, 8

OTHER AUTHORITIES

1B Moore's Federal Practice ¶ 0.402[2] 37 and n. 34 (2d ed. 1988) 13

Supreme Court Rules

Rule 10.1 14

Rule 10.1(a) 16

Rule 10.1(c) 14

No. 90-1212

In The

Supreme Court of the United States

October Term, 1990

TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL.,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT STATE OF CALIFORNIA IN OPPOSITION

The State of California, Respondent, respectfully submits this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, filed January 28, 1991, by Tahoe-Sierra Preservation Council, Inc., and named members thereof, Petitioners.

OPINIONS BELOW

The opinion of the Court of Appeals (Petition Appendix at 1a-35a) is reported at 911 F.2d 1331. The opinions of the district court (Petition Appendix at 36a-52a and 53a-72a), contrary to petitioners' representations (Petition at 1-2), are reported at *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 611 F.Supp. 110 (D.Nev. 1985) and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 638 F.Supp. 126 (D.Nev. 1986), respectively.

JURISDICTION

Respondent State of California (hereinafter "California") concurs in petitioners' jurisdictional statement, with the caveat that petitioners' constitutional claims are moot for the reasons set forth herein.

STATUTORY PROVISION INVOLVED

California adopts petitioners' citation of statutory provisions raised by this petition, as supplemented by that of co-respondent Tahoe Regional Planning Agency (hereinafter "TRPA".)

STATEMENT OF THE CASE

California adopts the statement of the case contained in co-respondent TRPA's Brief in Opposition. However, California offers the following supplemental observations:

First, a parallel action brought by petitioner Tahoe-Sierra Preservation Council and individual property owners is currently pending in the Ninth Circuit Court of Appeals. (*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, CA No. 87-2096.) While the complaint in that litigation raises the same substantive claims addressed in the present action, the district court in the case now before the Ninth Circuit analyzed and resolved those claims in a significantly different manner. Moreover, the Court of Appeals in the parallel appeal is considering several of the same issues (*e.g.*, mootness) presented by the instant petition.

Second, this case does not reach this Court with the constitutional issues raised by petitioners and addressed by the Court of Appeals fully resolved. Substantial portions of the case have been remanded to the district court for further proceedings. (*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1342-1343 (9th Cir. 1990).) Indeed, the only aspect of the Court of Appeals' decision presently before the Court is the narrow holding that one of the petitioners' constitutional challenges to the 1984 Regional Plan is not ripe for review.

Finally and most importantly, the 1984 Tahoe Regional Plan (enacted by the Tahoe Regional Planning Agency on April 26, 1984, and hereinafter "1984 Regional Plan") which forms the basis of petitioners' challenge has never had any actual effect on petitioners' property, is no longer in effect, and never will be. This is due to two interrelated developments. Immediately upon TRPA's adoption of the 1984 Regional Plan, the People of the

State of California sued to enjoin the implementation of that Plan, on the ground that it failed to satisfy the stringent requirements of the bistate Tahoe Regional Planning Compact. (Pub.L. 96-551, 94 Stat. 3233 (1980); Cal. Gov. Code §§ 66800-66801; *N.R.S.* §§ 277.190-277.200; hereinafter "bistate Compact.")[1] The district court agreed, issuing the injunction sought by California, and the Court of Appeals affirmed. (*People ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1308 (9th Cir. 1985).) The 1984 Regional Plan consequently never took effect.

While that litigation was pending, TRPA, California, petitioner Tahoe-Sierra Preservation Council and numerous other interested parties undertook painstaking negotiations and mediation efforts designed to create a new Regional Plan which could satisfy both the legal requirements of the bistate Compact and the disparate interests of the parties involved. Those efforts, which consumed three years, ultimately bore fruit: in July 1987, TRPA adopted a new Regional Plan which expressly supersedes the 1984 Plan at issue here. The pending litigation was then settled and the injunction against the now-superseded 1984 Regional Plan was dissolved. As TRPA notes in its Brief in Opposition (at 13), the 1987 Plan is markedly different from that challenged in the present lawsuit. Petitioners, moreover, concede (Petition

---

[1] This stands in stark contrast to petitioner Tahoe-Sierra Preservation Council's opposite contention – advanced here and in related litigation – that the 1984 Regional Plan constituted an excessive and unconstitutional "overregulation" of private property.

at 8, n.5), that the 1987 Regional Plan is not at issue here.

ARGUMENT

Petitioners' challenge to TRPA's 1984 Regional Plan has been rendered moot as a result of that Plan's being enjoined by the district court and subsequently superseded by the 1987 Regional Plan. Moreover, the Court of Appeals properly followed applicable precedents in holding that petitioners' facial takings challenge to the 1984 Regional Plan was not ripe for judicial determination, due to petitioners' failure to seek an amendment to that Plan as specifically authorized under Article V(a)(2) of the bistate Compact. Accordingly, this case does not warrant review.

A. Petitioners' Constitutional Claims are Moot Because the 1984 Regional Plan Was Enjoined by Federal Court Order from Taking Effect, and Because it Has Been Wholly Superseded by a Materially Different 1987 Regional Plan.

Petitioners seek certiorari to review the ripeness standard applied by the Ninth Circuit to takings claims arising from the 1984 Regional Plan. However, petitioners' constitutional claims are moot because an injunction – issued by the district court and sustained on appeal by the Ninth Circuit – prevented that Plan from ever being implemented. (*See People ex rel. Van de Kamp v. Tahoe Regional Planning Agency, supra*, 911 F.2d 1331.)[2]

---

[2] In her concurring opinion below, Judge Fletcher reasoned that because the 1984 Regional Plan had never taken

(Continued on following page)

Moreover, the 1984 Regional Plan was explicitly superseded by TRPA's July 1987 adoption of a new Regional Plan that currently governs planning and development activities within the Tahoe Basin. The 1987 Regional Plan was the product of lengthy negotiations that included petitioner Tahoe-Sierra Preservation Council, dramatically differs from the terms of the superseded 1984 Regional Plan, and is not at issue in this litigation.

Federal courts may only adjudicate actual, ongoing cases or controversies. This requirement subsists through all stages of federal judicial proceedings, trial and appellate. (*Lewis v. Continental Bank Corp.*, 494 U.S. ___, 110 S.Ct. 1249, 1253-1254 (1990).) As noted, petitioners never were affected by the 1984 Regional Plan because a federal court enjoined that Plan before it was ever implemented. And, since the 1984 Regional Plan has now been superseded by the enactment of the 1987 Regional Plan, petitioners' lawsuit is devoid of any present, live controversy. A petition for certiorari ought not be granted to review a moot claim. (*See id.*)

(Continued from previous page)

effect, petitioners had failed to establish the key element of causation of their takings claims. (*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, supra*, 911 F.2d at 1343-1344 (Fletcher, J., concurring).) California commends this analysis to the Court's attention, and believes it provides a fully adequate and independent basis upon which to deny the petition for writ of certiorari.

B. The Court of Appeals Properly Applied the Ripeness Standards Developed by This Court in Recent Decisions to Bar Petitioners' Facial Takings Challenge to the 1984 Regional Plan, Where Petitioners Had Failed to Seek an Amendment to That Plan as Specifically Authorized in the Tahoe Regional Planning Compact.

1. The Unique Provision of the Tahoe Regional Planning Compact Applicable to This Proceeding Cannot Reasonably Be Ignored by Petitioners.

This case involves interpretation of the Tahoe Regional Planning Compact, a uniquely-crafted document designed by California, Nevada and the United States Congress. That Compact deals both with the unique environmental features of Lake Tahoe, and the complex governmental relationships inherent to the region. (*See* co-respondent TRPA's Brief in Opposition at 8-11.)

The unique bistate Compact provides those affected by a Regional Plan a focused opportunity to seek relief from provisions of that Plan. Compact Article V(a)(2) specifically requires TRPA to act within 180 days upon a property owner's request for an amendment to TRPA's Regional Plan.[3] Petitioners failed to avail themselves of that procedural opportunity prior to commencing this litigation.

---

[3] Co-respondent TRPA has effectively rebutted petitioners' meritless contentions that recourse to the administrative remedy afforded by Article V(a)(2) would be futile or barred by the statute of limitations. (*See* TRPA Brief in Opposition at 20, n.16.)

Article V(a)(2) establishes a unique and specific procedure for seeking relief from otherwise-applicable Plan provisions. Accordingly, this Court's ripeness principles – requiring a final decision before a takings claim may be addressed on the merits – was appropriately applied by the court below to bar petitioners' takings claims. (*See Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir. 1987), modified at 830 F.2d 968 (1987), cert. denied, 484 U.S. 1043 (1988).)

2. The Ninth Circuit's Decision in Rejecting Petitioners' Facial Takings Challenge to the 1984 Regional Plan Is Fully Consonant with This Court's Previously Articulated Ripeness Standards.

Petitioners assertedly mount a "facial" challenge to the 1984 Regional Plan,[4] claiming a taking without just compensation because various aspects of the Plan allegedly limit their ability to develop their properties. They argue that their facial challenge should be exempted from the constitutional requirement that landowners seek a final decision as to the uses available for their property. Petitioners' arguments, however, ignore the ineluctable

---

[4] Petitioners, in their opposition to defendants' motions to dismiss the complaint on ripeness and other grounds, expressly sought to limit their challenge to the 1984 Regional Plan to a facial attack (District Court Clerk's Record 28 at 70-72), despite the specific aspects of the complaint which suggest an as-applied challenge (*e.g.*, the particularized information in the appendices to complaint containing information as to the land use capability of each parcel at issue in the lawsuit (Petition Appendix at 195a-199a)). Defendants below framed their responses consistent with petitioners' characterization of their claims as facial.

fact that a constitutional takings claim cannot be analyzed before a final decision as to the allowable uses of the subject property has been reached.[5]

In *Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985), this Court specifically identified the ripeness requirements for takings claims raised under the Just Compensation Clause of the Fifth and Fourteenth Amendments. To pursue a takings claim, a landowner must obtain a final decision from local regulatory authorities regarding the uses to which the property in question can be put. (*Id.* at 186, 199-200.)[6] The "final decision" standard includes a requirement that the property owner seek variances from the applicable regulations. (*Id.* at 191.)

The reasons for the final decision requirement go to the nature of the constitutional claims themselves. (*Id.* at 190-191, 199-200.) As to constitutional takings claims, this Court reasoned that a final decision is necessary in order to analyze factors of particular significance: the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. (*Id.* at 190-191.) These criteria cannot be determined until a final decision has been made by the regulating

---

[5] In fact, petitioners' real disagreement appears to be with the ripeness standards identified in this Court's recent takings decisions, rather than the Court of Appeals' application of those standards. (*See, e.g.*, Petition at 4-6.)

[6] A second ripeness requirement articulated in *Williamson* – that a landowner must utilize state procedures which provide for obtaining just compensation (*Id.* at 194) – is not at issue here.

body as to the nature and extent of the development that will be permitted. (*See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348-349 (1986); *Williamson County v. Hamilton Bank, supra*, 473 U.S. at 199-200.)

The Court stated this principle forcefully in *MacDonald, Sommer & Frates v. Yolo County, supra*, 477 U.S. at 348:

> "It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."

Significantly, petitioners' assertion that a facial takings claim is somehow exempt from the final decision ripeness requirement does not address the foregoing constitutional analysis developed by this Court in *Williamson* and *MacDonald*. Moreover, petitioners' curious theory is effectively rebutted by the Court's recent decision in *Pennell v. City of San Jose*, 485 U.S. 1 (1988). *Pennell* rejected as premature a landowner's facial takings challenge to a municipal rent control ordinance.[7] Citing an administrative relief procedure contained in the ordinance, the Court held that it would be premature to consider the takings claim where the plaintiff had not first availed

---

[7] While there is some ambiguity as to the characterization of the claims raised in *Pennell*, this Court's analysis of the takings claims was a facial analysis of an ordinance as yet unapplied to a specific set of facts. The ordinance at issue in *Pennell* was attacked as "facially unconstitutional." (*Id.* at 4.)

himself of that administrative remedy. (*Id.* at 8-10.) Citing its earlier takings decisions, the Court admonished – again – that such claims must necessarily be resolved in the context of a concrete factual setting. (*See also Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980), in which the Court rejected the landowners' facial takings claim because they were "free to pursue their reasonable investment expectations by submitting a development plan to local officials.")

This reasoning has been embraced by the lower courts as well. As the First Circuit recently observed in *Smithfield Concerned Citizens v. Town of Smithfield*, 907 F.2d 239, 242 (1st Cir. 1990):

> "Under this particular [takings theory], the step of applying for variances must of necessity become a prerequisite to bringing a due process challenge – *whether facial or as applied* – because only by applying for variances would it become possible to learn whether or not the zoning ordinance had the same effect as a taking by eminent domain. *If a variance were granted, any taking claim would disappear.*" (Emphasis added.)

Petitioners' efforts to abrogate these established ripeness criteria regarding facial claims are unsupported by the authorities they cite. *Euclid v. Ambler*, 272 U.S. 365, 384 (1926), for example, considered a *due process and equal protection* challenge to a land use ordinance. These are, of course, different constitutional challenges than the takings claim raised here. (*See Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990), cert. denied, 59 U.S.L.W. 3441 (1991), for a discussion of different ripeness tests for various constitutional claims.) Moreover – and this flaw undermines petitioners' reliance on all Supreme Court

cases they cite – *Euclid* failed to identify or discuss the ripeness criteria applicable to current takings challenges. In short, the circumstances which led this Court to consider claims in *Euclid* without requiring that a variance be applied for do not exist in this case.

Other Supreme Court precedents relied upon by petitioner to support the notion that facial challenges are not subject to the final decision ripeness requirements similarly fail to address the ripeness requirement. (*See, e.g., Keystone Bituminous Coal v. DeBenedictis*, 480 U.S. 470 (1987) (the procedural posture of *Keystone* bears note: the parties filed a joint motion asking the lower court to certify the facial challenge for appeal) (*Id.* at 493-494).) In *Hodel v. Irving*, 481 U.S. 704 (1987) – another case cited by petitioners – this Court considered a variety of preliminary issues, including standing, but did not address the question of ripeness.[8]

Nor does *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1986), support petitioners' position. That case came to the Court in a procedural posture entirely different from the present litigation. In *First English*, the Court was asked to *assume* that an unconstitutional taking had occurred; the sole

---

[8] In any event, petitioners' characterization of this case as a facial challenge is surprising in that the plaintiffs in *Hodel* were heirs or representatives who had not received otherwise-inheritable interests in property, due to the operation of section 207 of the Indian Land Consolidation Act of 1983 (Pub.L. 97-459, Tit. II, 96 Stat. 2519.) (*Id.* at 709-710).

issue was the appropriate *remedy* for such an uncompensated taking. (*Id.* at 311.) Accordingly, the ripeness issue was neither raised nor discussed. However, the Court there took pains to distinguish cases such as *Williamson County v. Hamilton Bank, supra,* 473 U.S. 172, and *MacDonald, Sommer & Frates v. Yolo County, supra,* 477 U.S. 340, where "factual disputes yet to be resolved by state authorities might still lead to the conclusion that no taking occurred." (*Id.*) *First English* thus provides utterly no support for petitioners' claim.

It is axiomatic that decisions which fail to address or resolve a particular issue cannot serve as binding precedent for subsequent cases that raise the question. (*Webster v. Fall,* 266 U.S. 507, 511 (1925); 1B Moore's Federal Practice, ¶ 0.402[2] 37 and n.34 (2d. ed. 1988).) Because the Supreme Court cases embraced by petitioners simply do not address the ripeness issue, they are of no precedential value on this point.[9]

Petitioners have failed to establish that the decision below conflicts with applicable decisions of this Court.[10]

---

[9] Other cases cited by petitioners similarly lack discussion of ripeness issues: *Goldblatt v. Hempstead,* 369 U.S. 590 (1961), an action to enjoin further mining for failure to comply with local ordinances, contains no discussion of ripeness requirements. Also, *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), which involved a physical taking, fails to address ripeness principles.

[10] Petitioners' further argument that the decision below conflicts with prior Ninth Circuit precedent fails for three

(Continued on following page)

They have therefore failed to present a proper basis for granting the petition for certiorari. (Supreme Court Rules, Rule 10.1(c).)

3. The Decision Below Articulates a Ripeness Standard Fully Consistent with Those of Other Circuits.

Petitioners mistakenly assert that the decision below articulates a ripeness standard in conflict with recent opinions from the First, Fourth, and Eleventh Circuits. (Petition at 20-22, citing *Smithfield Concerned Citizens v. Town of Smithfield, supra,* 907 F.2d 239 (1st Cir.); *Beacon Hill Farm Associates v. Loudon County Board of Supervisors,* 875 F.2d 1081 (4th Cir. 1989); and *Eide v. Sarasota County, supra,* 908 F.2d 716 (11th Cir.).)

However, none of those cases involved the type of regulatory takings claims asserted by petitioners. Therefore, the ripeness standards applied to these distinct claims are inapposite.

(Continued from previous page)

distinct reasons. First, intra-circuit conflict does not constitute a stated ground for Supreme Court review. (*See* Supreme Court Rules, Rule 10.1.) Second, petitioners' reliance on the Ninth Circuit cases cited in the petition is flawed because the facts of those decisions make them inapposite to the present case. Finally, as petitioners themselves are ultimately forced to concede (*See* Petition at 24, n.16), the decision below is consistent rather than at variance with other Ninth Circuit precedents. (*See, e.g., Southern Pacific Transportation Co. v. City of Los Angeles,* 922 F.2d 498 (9th Cir. 1990).)

In *Beacon Hill Farm Associates v. Loudon County Board of Supervisors, supra,* 875 F.2d at 1084-5, the court considered a facial challenge to a land use regulation on *due process and equal protection* grounds. In *Smithfield Concerned Citizens v. Town of Smithfield, supra,* 907 F.2d at 242, analyzed above, the court considered a facial substantive due process claim to a land use regulation, which it found distinct from a due process takings claim. Neither of these cases involved a claim, as made by petitioners, of an unconstitutional taking of property. (*Smithfield, supra,* 907 F.2d at 241; *Beacon Hill, supra,* 875 F.2d at 1084.) That these cases each found the constitutional claims raised to be ripe without requiring that a variance be applied for (*Smithfield, supra,* 907 F.2d at 242; *Beacon Hill, supra,* 875 F. 2d at 1085) does not establish a conflict with the Ninth Circuit's ripeness requirements for a different constitutional claim.[11]

Similarly, *Eide v. Sarasota County, supra,* 908 F.2d 716, does not present a conflict with the Ninth Circuit's opinion below. In *Eide,* the court considered an as-applied "arbitrary and capricious due process claim" and an equal protection claim, and found these claims unripe because a final decision as to the uses permitted upon the property in question had not been obtained. (*Id.* at 723-725.) It is significant that the *Eide* court, in determining the ripeness standards applicable to the claims it faced, identified the ripeness standards for Fifth and

---

[11] Another factually inapposite case relied upon by petitioners is *Fry v. City of Hayward,* 701 F.Supp. 179 (N.D. Cal. 1988) which raises a facial equal protection claim.

Fourteenth Amendment takings claims as those articulated in *Williamson County, supra,* and *MacDonald, Sommer, & Frates, supra.* (*Id.* at 720-721.) As California identified *supra,* it is precisely these standards which were applied to petitioners' takings claims by the Ninth Circuit below.

Petitioners' claim that the decision below conflicts with those of other circuit courts of appeal is, therefore, without merit. Petitioners have failed to demonstrate any principled basis on which this case warrants Supreme Court review. (*Cf.* Supreme Court Rules, Rule 10.1 (a).)

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: February 28, 1991

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General

RICHARD M. FRANK, Acting
Assistant Attorney General*

CARLA J. CARUSO
Deputy Attorney General

Counsel for Respondent
State of California

*Counsel of Record